No. 16367

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR A. ARNHOLD, et al, *Appellants,*

vs.

UNITED STATES OF AMERICA, et al,

REPLY BRIEF OF APPELLANTS

FERGUSON & BURDELL
W. H. Ferguson,
Donald McL. Davidson,
Attorneys for Appellants.

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Seattle 1, Washington

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I. INTRODUCTION

The primary issue raised by this appeal is the liability of the Government and PAW upon the findings of fact made by the trial court. Simply stated it is the proposition that negligence before, at and after the inception of a fire is the legal cause of damage done by that fire when it has been determined from the evidence that the negligent actors knew of the risks they created and negligently permitted the risk to be realized in actual harm to these appellants.

In substance, the briefs of all of the respondents avoid reply or attention to the basic proposition of the law of negligence, beg the question posed by the findings or rely solely upon the trial court's bare legal conclusion of lack of separate and distinct proof of proximate cause despite its manifest inconsistency with all other findings of fact and lack of support in the evidence.

The first 21 pages of the Government's brief is

largely an unnecessary and argumentative statement of the Government's evidence at the trial which it there unsuccessfully maintained was a showing of due care. From pages 29 to 43 the Government again argues factual questions which the judge set at rest in his findings that the PAW and Government were:

> "negligent in allowing a fire hazardous condition to exist on its right of way generally and in the particular area where the Heckleville fire started." (R. 184) and
>
> "failed to use ordinary care in maintaining the railroad right of way generally and specifically in the area of the Heckleville fire, in a reasonably fire safe condition (R. 234)," and
>
> "a finding of negligence chargeable to the United States in the initial period [of the fire] is required" (R. 197), and
>
> "Ranger Floe and his subordinates . . . failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care in attacking the Heckleville spot fire and attempting to confine it to the 60-acres area." (R. 234-5), and such failures,
>
> "make the difference between a small fire quickly disposed of with little or no damage and a conflagration of extensive proportions resulting in great loss of life and property." (R. 197).

In short, all of the factual factors upon which a conclusion of legal cause is predicated were found in favor of appellants. Respondents have only argued that the Court erred in finding such factors, or have urged that the trial court should have found that there was in fact no negligence relating to the occurrence or spread of the fire or should have found

that there was some cause other than the Heckleville fire for appellants' damage. The trial court did not and could not do so.

II. Washington Law

No respondent has answered the basic problem of this appeal: that Washington Law—and the rule of law announced by but not followed by the trial court—requires that judgment should be for the appellants upon the Findings of Fact made below. The District Court in his memorandum opinion clearly and concisely stated the universal rule of proximate cause, that:

> "All damages of a kind reasonably foreseeable as a consequence of the failure to exercise reasonable care for the restraint and suppression of a fire may be recovered against the negligent party. To constitute an intervening independent cause as a break in the chain of proximate causation precluding recovery against a negligent defendant, Acts of God or negligence of others must be the sole proximate cause of the damage complained of. The burden of going forward with evidence sufficient to sustain a finding of intervening, independent, proximate cause rests on the party asserting it. If negligence of a defendant in starting or in failing to confine or suppress a fire combines and concurs with the negligence of others or with Acts of God to proximately cause damage to third parties, such defendant is liable for the whole of the damage so caused. [citing cases]"

Having noticed the applicable rule of proximate cause, the court thereafter ignored it.

If it is assumed that the fire started in "material to be found on the right of way of similar railroads in the area at the time of year in question no matter

how well kept up with respect of fire precautions" (R. 185) the fire surely did not miraculously confine itself to such material as it spread out of control. Surely if fate had destined the occurrence and spread of the fire, such an Act-of-God fire was concurrent with Ranger Floe's previous negligence and lackadaisical efforts to control it and the burden was upon PAW and the Government "of going forward with evidence sufficient to sustain a finding" that the Act of God "must be the sole proximate cause," i.e. that negligence had no bearing upon the occurrence or spread of the fire. At the trial no witness said that a fire is as likely to occur on a well kept right of way as on a poorly kept one. No one said fire will or on August 6, 1951, would have spread as fast or as far on a well-kept right of way as it did on the littered right of way. No witness said the Heckleville spot fire was not controllable and could not have been controlled by due diligence. All agreed that the contrary was the case at least during the early stages of the fire.

No respondent has disputed the rule of law announced by the court or distinguished the numerous cases relied upon by the court for so ruling nor offered any factual evidence from the record justifying deviation from that principle.

> "The fundamental basis of the law of negligence is the ability of the actor reasonably to foresee the consequences of his misconduct. If the particular injury was reasonably expectable at the time of the misconduct, then the act of negligence will be regarded as the legal, or proximate cause of the injuries sustained." *Eckerson v. Ford's Prairie School District No.* 11, 3 Wn. (2d) 475, 484, 101 P. (2d) 345, 350, (1940).

Such a determination of proximate cause is purely a legal question, similar to that where violation of a statutory standard of care creates the exact hazard the statute was intended to prevent. In such a situation, "reasonable minds could not differ upon the conclusions that the violation of the statutory standard of care . . . was a proximate and legal cause of the accident." *Guerin v. Thompson,* 53 Wn. (2d) 515, 520, 335 P. (2d) 36, 39, (1959).

> "Where, as here, the facts are taken as undisputed, and the references therefrom are plain and do not admit of reasonable doubt or difference of opinion, questions of proximate cause become a question of law for the court." *Cook v. Seidenverg,* 36 Wn.(2d) 255, 262, 217 P. (2d) 799, 802, (1950).

See also *Ross v. Johnson,* 22 Wn.(2d) 275, 155 P. (2d) 486 (en banc 1945); *Swanson v. Gilpin,* 25 Wn. (2d) 147, 169 P. (2d) 356. The facts here cannot be disputed by respondents in the absence of a cross-appeal. The court in this case has found that the PAW and the Government created an unreasonable risk of fire, knowing of the catastrophic consequences that might ensue. In the *Swanson case, supra,* the court said:

> "If the consequences of a negligent act were foreseen by the actor, for the purpose of determining proximate cause, it does not matter whether those consequences were immediate or remote." (169 P.(2d) 358)

III. ***The facts and the record conclusively establish that Government and PAW negligence at least contributed to the existence of the 1600-acre fire.***

These appellants concur with the Government and Rayonier that the trial court intended to hold

as a matter of law that no negligence of the Government or PAW caused or contributed to the damages suffered by appellants. However, these appellants do not think that in amending his findings of fact, Judge Boldt intended to withdraw his factual findings that such negligence at least concurred in the spread of the fire and hence contributed to the existence of the 1600-acre fire.

At pages 23 and 27 of the court's original written decision, the court had found "that by reason" of the Government's negligence and "because of the failure of United States employees to expeditiously perform such duty" the fire spread from the right of way to the 60-acre tract and then to the 1600-acre tract. These two findings were unequivocal in stating that the negligence of the Government actually caused the 1600-acre fire, and both are the only reasonable inference from overwhelming evidence. Both statements were ordered deleted (R. 242-43), however, because the trial court conceived it necessary to have direct, eyewitness evidence of such facts. Neither was nor is in conflict with the remaining finding of fact that United States negligence "proximately contributed" to the spread of the fire to the 1600-acre area. (R. 203.) Judge Boldt made the two deletions on or about September 16, 1958 (R. 238), almost two months after the meaning of his original findings were called to his attention (R. 244) and after it was specificaly pointed out that there is nothing "inconsistent because . . . it can proximately contribute without being the sole cause." (R. 293).

In the nature of things, the Judge said, "a poorly-kept right of way would, of course, be more likely to contribute to starting the fire or its spread after-

wards" (R. 268). The court agreed that "the fire was operating as a result of the negligence in a larger area than it would have been had there been no negligence" (R. 283-4) and that "there is certainly a reasonable inference that (negligence) had some bearing" on the progress of the fire (R. 295) even though he found it impossible to determine the precise extent of the increased hazard (R. 283-4).

In the light of Judge Boldt's comments and the care with which his memorandum decision was amended and the long period of time in which it was under review, appellants do not believe that he intended to alter his decision beyond the extent he actually did so.

IV. ***The Court below expressly determined that Finding XII. respecting weather conditions was only descriptive at best of the factor causing the flareup of the Heckleville fire.***

When requested to clarify the meaning of his findings relating to weather conditions, so as to recite:

> "That the wind, low humidity, and high temperature which occurred during the night of September 19 and 20, did not cause damage, and of themselves as independent forces did not damage the plaintiffs' property," the trial court said:
>
> "That would be the same statement of a simple self-evident fact that would be ridiculous to contain in a formal finding, and if that is all that is intended to be stated here, I don't see any point in stating it at all. It is perfectly apparent to everyone—or must be perfectly ap-

parent to everyone, if there wasn't any fire[1] you couldn't have burned anything." (R. 260).

The limited meaning of the court's findings of an "extraordinary *concurrence*" of three weather factors at a particular four-hour period (R. 233) and an "unforeseeable and fortuitous *combination*" (R. 236) is clearly established by the evidence. The language used closely follows appellants' evidence that where a combination or "group of several different items" of weather is considered "rarely . . . if ever, would they concur exactly as to time and elements" (Tr. 2162). The evidence is overwhelming, however, that "similar, not exactly the same" weather conditions were a frequent occurrence. (R. 2162).

On September 13, 1951, fire twice blew out of the 1600-acre area. The evidence is undisputed that weather conditions on that day were very similar, if not identical to those that occurred six days later.[2] Mr. Evans testified in a deposition in March of 1953 (R. 1212) there was a "strong east wind blowing" that day according to his diary (R. 1213), and that the east wind at least helped to cause the second flare-up on the evening of September 13 (Tr. 1221). Weather reports of September 13 showed that there were two sharp drops in humidity and

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[1]PAW and the Government's brief in the heading of their arguments on this finding properly characterize it as merely stating what caused "a flare-up in the 1600-acre area" (G. B. 50, PAW B 28). Fibreboard's brief, however, contrary to "self-evident fact" states that the wind and weather "caused the fire" (F.B. 29).

[2]G.B. at p. 50 says there was no evidence of this fact. It was undisputed at the trial and no explanation was ever made by respondents of any unusual factor causing or contributing to these two frightening harbingers of the disaster to follow.

that a northeast or east wind developed during the same period (Tr. 2164-65).

Regardless of all else, the fact that an east wind twice blew fire out of the 1600-acre area within six days of the final breakout gave Ranger Floe actual knowledge that the fire was still alive and capable of exploding under ordinary weather conditions.

James Anderson said that winds of 20 to 25 miles per hour in the late summer and early fall months "certainly wouldn't be impossible and wouldn't be so awful unusual" and that there are "apt to be winds" of that velocity in August and September. He agreed that such winds could be expected and agreed that "occasionally winds even stronger than that might be apt to occur." (Tr. 3237)[3]. Fibreboard's expert witness (Tr. 4387-88) agreed that humidity readings at a nearby weather station on September 20 had been exceeded many times (Tr. 4414) and that wind readings on that day were not unusual (Tr. 4415).

There is no material dispute that between September 19 and 20 various persons at places within 20 miles of Heckleville observed winds of some force. Some of them even characterized such winds, or gusts, as being over 39 miles per hour, which would constitute gale-force winds on some weather scales. Many persons testified as to high winds. There was, however, no testimony even approaching that required to show such winds were unfore-

[3]G.B. at page 51 quotes appellants' narrative statement of this witness' testimony, then charges that the witness did not use the precise words of the narrative statement. Such a misleading characterization of appellants' brief coupled with the argument made is chimerical dialectics. This, and much similar picayunish disputation attests to the purely verbal level of the Government's argument and position.

seeable—indeed, virtually every witness had personal knowledge of higher winds at approximately the same season of the year on several previous occasions. In the year 1951 alone, northeast or east winds have equalled or exceeded the 30-mile peak wind recorded on September 20 at Tatoosh Island some 54 times, five times in September and seven times in October (Tr. 2218).

V. *Reply to PAW Brief*

All but pages 35-37 of PAW's brief rest substantially upon evidence deemed to show that it was free of negligence—all of which was rejected by the trial court in making contrary findings. In the brief pages devoted to its breach of duty under Washington law it argues that proximate cause can be a jury question. Negligence in the maintenance of a railroad right of way is, however, a "cause in fact" and a legal cause of damage from a right-of-way fire equal in all respects to and indistinguishable from a fire caused by negligence in the operation of a railroad.

Firemen's Fund Insurance Co. v. Northern Pac. R. Co., 46 Wash. 635, 639, 91 Pac. 13, 15 (1907) adopted the obvious principle of *Thompson on Negligence,* § 270, that:

> "The removal of such combustible substances is quite as much a means of preventing the communication of fire from their locomotives as is the use of inventions for preventing the escape of fire from the locomotives themselves. . . .
>
> "The round statement of this doctrine is that, where a railroad company sets fire to the dry grass and other combustible materials which it

> has negligently suffered to accumulate on its right of way, and, without fault of the adjacent owner, to permit such fire to escape to his lands and burn and destroy his property, it will be liable to him for the damages, whether the escape of such fire was due to its negligence or not."

Insofar as proximate cause may be a jury question in a fire case, Washington courts have approved instructions to juries to determine that issue upon foreseeability; *Fireman's Fund Ins. Co. v. Northern Pac. Ry. Co.,* 46 Wash. 635, 91 Pac. 13; or upon evidence of communication from the defendant's fire and the elimination of other causes, *McCann v. Chicago, M. & S.P. R. Co.,* 91 Wash. 626, 158 Pac. 243 (1916)[4]; *North Bend Lum. Co. v. Chicago, M & S.P. R. Co.,* 76 Wash. 232, 249-50, 135 Pac. 1017, 1023-1024, (1913); *Wick v. Tacoma Eastern R. Co.,* 40 Wash. 408, 411, 82 Pac. 711, 812 (1905).

In this case, the court has expressly found that the damage that occurred was foreseeable, and the fire that caused the damage was the Heckleville fire, and that the fire started on the negligently maintained PAW right of way. There was nothing more for the trier of fact—whether jury or court—to do. Legal causation then follows as of course from the facts. There are only four combinations possible: a negligently maintained right of way and an accidental railroad fire; a negligently maintained right of way and a negligently loosed fire; a proper right of way and a negligently loosed fire, or

[4]"The burden was on plaintiff to trace defendant's fire to their own premises and show that their fire 'was caused by this particular fire *and none other.*' This instruction was pronounced sufficient, and nothing in the *North Bend case, supra,* is to be construed as requiring more." (at 91 Wash. 628, 158 Pac. 244).

a proper right of way and an accidental fire. Only in the last case has a railroad performed its duty of maintenance and operation so as to avoid liability for fire damage to others.

The legal question of proximate cause rests upon "considerations of justice and public policy".[5] If distinct and certain proof is required of the ignition and spread of fire through particular negligently maintained pieces of debris, it could never be offered in any fire case. Justice and public policy prohibit imposition of any such burden of proof whether it frees the wrongdoer under the heading of negligence or proximate cause.

VI. Reply to Fibreboard's Brief

Fibreboard's brief concedes that it took no independent action against the fire although it burned onto its lands through its slash, continued burning on its lands adjacent to more slash and ultimately escaped through that slash.

The evidence quoted at length in Fibreboard's brief (p. 18-28) establishes that Fibreboard willingly cooperated in paying its men for fighting the fire in and about its own slash on its own lands (F. B. p. 20) and that it would not have been desirable for it "to interfere and overrule, if you please, Forest Service." (F. B., 22) and that had Fibreboard taken any action at all there "would have been most certainly a passing of the buck" if something went wrong. (F. B., 25). Fibreboard's defense is nothing else. If it had thought of going to the Forest Service with the request that something further be done, it

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[5] *Eckerson v. Ford's Prairie School District No.* 11, 3 Wn. (2d) 475, 482, 101 Pac. (2d) 345, 349, (1940).

would have stifled the idea, feeling if it did take any control it "might be sued now for more than we are." (Tr. 4458). In fact, however, Fibreboard's manager emphatically denied that landowners generally let the Forest Service take over fires on their own land. He said Fibreboard did "definitely fight fire on our own lands" and that as a general proposition Fibreboard and the Forest Service dealt on a mutual and equal basis:

> "we would give the Forest Service help whenever they needed it, and conversely, by the token, if we needed help on a fire, the Forest Service would help us." (Tr. 4477, 4478).

All of the 1600-acre area was in previously logged over land, 1300 acres of which had been logged within 10 years of 1951 (Tr. 4464). The fire in the 1600-acre area was stopped only when it reached green timber on the south (Tr. 4465), southwest and north (Tr. 4466) and by a pre-existing logging road on the east (Tr. 4466).

There is no dispute that Fibreboard's slash was a powder keg ready to explode into a fierce, uncontrollable fire broadcasting sparks over a wide area in the convection currents created by the fury of its burning (Tr. 2675, 3468, 3789-90, 4004, 4130-31). It was recognized two years before the breakaway that if fire ever got going in the slash it was going to be a big one (Tr. 4133-34).

Slash burning, of course, creates a hazard which is minimized by planning and close and adequate control measures. It must be done carefully and is expensive. Slash is and twice proved in this very case to be a major cause of the escape of fire—first throughout the 1600-acre tract and then to Forks. Fibreboard's slash was artificially created forest

debris deliberately maintained on the Olympic Peninsula contrary to a particular Washington statute making it unlawful to "expose any of the forest or timber on such land to the hazard of fire."[6] The Court below did not determine that the slash could not have been burned. The court could not approve Fibreboard's policy determination to run the risk of slash deterioration by time rather than disposal without adopting a standard of care contrary to the legislative determination of the standard of care required upon the Olympic Peninsula.

Great Northern Railway Co. v. Oakley, 135 Wash. 279, 237 Pac. 990 (1925) gave a landowner *indemnity* for a judgment it had paid when a fire started on lands in the vicinity" and "burned across this land" because of the presence of slash. The court affirmed a judgment over against the receiver of the insolvent purchaser of the timber, as a preferred claim. The court said it must be conceded that there was a tort at the foundation of the original judgment, that the insolvent had not breached the slash disposal statutes prior to insolvency because the slash "could not be successfully burned prior to that date." On the other hand, the receiver in possession only eleven months had breached the

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[6]R.C.W. 76.04.450 provides:

Olympic peninsula area protection. All forest and timber upon all lands in the state of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

statutes and committed the tort because he failed to dispose of the slash "although the ordinary and safe burning season shortly ensued after his appointment as a receiver." His conduct could not be excused because "such burning would be a menace to the personal property of the insolvent, which was on the land" and which the receiver had a duty to conserve.

This case establishes the contrary of Fibreboard's contention, i.e.:

1. In Washington there is liability upon one across whose lands fire spread because of fire hazards there maintained. As to innocent third parties both the owner and person who unlawfully maintained slash are liable whatever their rights may be against each other.

2. The hazard and danger of burning slash is no excuse for violating the statutory command to do so. The legislature had decreed that such a controllable risk must be run to avoid much greater risks such as the Heckleville disaster.

3. The slash statutes do not impose liability without fault, but the burden is upon the party not in compliance with them to show that the slash "could not be successfully burned . . ." a contention Fibreboard did not seek to make.

If Fibreboard's policy arguments as to the relative merits of slash disposal as against the long-term hazard of deterioration are meritorious then legislative and administrative control of slash in the forests is virtually gone. If the common practice of corner-cutting loggers justifies refusal to abate slash, no logger need improve his practices nor follow the suggestions of state and federal protection

officers unless compelled to do so by court action at the instance of such officers—a tedious, costly and dangerously delayed remedy.

The Washington courts do not countenance such easy violation of its state laws.

Numerous cases arising under a wide variety of fire laws have imposed liability for the creation or maintenance of fire hazards or for breaches of specific commands of state or municipal fire control laws:

Conrad v. Cascade Timber Co., 166 Wash. 369, 7 P. (2d) 19 (1932).

Wood & Iverson, Inc. v. Northwest Lumber Co., 138 Wash. 203, 244 Pac. 712 (1926).

Mensik v. Cascade Timber Co., 144 Wash. 528, 258 Pac. 232 (1927).

Galbraith v. Wheeler-Osgood Co., 123 Wash. 229, 212 Pac. 174 (1923).

Kuehn v. Dix, 42 Wash. 432, 85 Pac. 43 (1906)

Babcock v. Seattle School District No. 1, 168 Wash. 557, 12 Pac. (2d) 752 (1932)

Seibly v. Sunnyside, 178 Wash. 632, 35 Pac. (2d) 56 (1934)

Appellants cannot reconcile the admitted facts of the hazard of slash and its substantial contribution to the spread of the fire with the unexplained fiat below that Fibreboard was not negligent in deliberately breaching numerous statutes designed to avert the very tragedy that occurred.

VII. Answer to Arguments of the Government upon Issues not Involved in this Appeal

The Government has not challenged any Findings of Fact, Conclusions of Law nor has it cross-

appealed. It does, however, argue at length issues foreclosed to it and four times refers to and discusses the previous decision of this Court as establishing some material facts or law relevant at this time. The prior appeal involved only allegations of the complaints—since superseded by pre-trial orders—and there were then no findings of fact or determination of Washington law made by the trial court.

The trial court at this stage of the proceedings has found that:

> "A study of all the authorities compels the conclusions that in the heavily forested State of Washington . . . the state law places upon an owner of land containing timber or in the immediate vicinity of timber lands, the duty to exercise reasonable care concerning maintenance of his premises as to fire precautions, even though exclusive possession and use of the land be vested in another by license, lease, easement or other contract." (R. 193).

The District Court, after examining the exhibits and hearing the testimony at the trial and knowing the acts, conduct and practical interpretation of agreements of the parties found as a fact that the PAW did not have exclusive possession and use of the right of way, but that the United States:

> ". . . retained title to all railroad property including the right of way, for purposes not inconsistent with the use thereof by PAW for railroad purposes, including the right of access to fight fire thereupon and to abate fire hazardous conditions thereon." (R. 229, Amend. Findings of Fact III.).

VIII. CONCLUSION

The Government's argument is directed mainly to arguing facts found against it in the trial and to lint-picking at the language or grammar of appellants' briefs.[7]

Fundamentally the factual issues involved in this appeal were settled by the trial court insofar as facts are susceptible of proof and determination in any way known to the law. If the trial court could upon those facts refuse to apply the universal rule of "legal cause" it is only because some overriding public policy should immunize these particular defendants from the consequences of their acts. The trial court articulated no conceivable justification for such policy.

Sovereign immunity offers no excuse if it ever was a meritorious defense to just claims of a citizen. The ruling below bars even the Government from recovery or seeking to recover its own damages from the PAW. The magnitude of the disaster and the sums that PAW and the Government should pay are only a slight portion of the fire protection the Government and Washington citizens will lose and the damages they will suffer if the negligent action here found to exist has no legal consequences.

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[7]Only the Government found it necessary to make a lengthy and argumentative statement of facts or to make assertions throughout its brief that there was anything misleading or erroneous at the various points it so characterizes the opening briefs of appellants. A brief description of the factious nature of the criticisms of Arnhold set forth in the Government's brief at pp. 22-24 is set forth in an appendix hereto—the nature of the criticism being such that it cannot be ignored but so trivial in its bearing upon the merits of the appeal that reply is not worthy of incorporation in the brief itself.

Years of neglect and lackadaisical attention to duty by the District Fire Ranger and the PAW on August 6 and 7 dealt both appellants and the Government a crushing blow on September 20, 1951.

No consideration of justice or public policy justify discharging the negligent by a novel application of any doctrine of proximate cause, whether characterized as a finding of fact, conclusion of law or burden of proof. Justice and public policy require that citizens and the Government alike should be under a duty to avoid the hazard of forest fires and take quick and proper action against them when they occur. If large forest harvesters such as Fibreboard do not meticulously observe fire control measures, no one else will do so. Fibreboard's deliberate violation of slash laws was clear. The legislature has determined that the hazard of uncontrollable slash fires requires slash abatement on the Olympic Peninsula whenever it is possible to do so. Any supposed competing policy such as promoting forest fertility or avoiding the risk of a planned, supervised and controlled slash fire are proper arguments to address to the legislature but are not relevant here. If slash deterioration in particular places under particular circumstances is proper practice foresters may determine that fact and certify to it. A unilateral determination by a logging company to run that risk cannot escape motivation by the immediate cost of slash disposal as opposed to the prospective damage to neighbors. The home and farm owners appealing this decision should not bear the entire burden of fire damage because Fibreboard gambled that it might harvest its timber crop a few years earlier a half a century from now.

Appellees should be held responsible for the results of their negligence.

Dated at Seattle, Washington, this 20th day of March, 1960.

Respectfully submitted,

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IX. APPENDIX "A"

I.

The Government's many hortative assertions that appellants' brief is "unsupported by the record," "taken out of context" and gives "an inaccurate picture" (G.B. 21), requires the following brief rebuttal:

Of seven instances, four refer to appellants' argument and not to any statement of facts (par. d, e, f and g) and are themselves argumentative at best. Several relate to findings of the court. Thus the court expressly found that Ranger Floe, on August 6, 1959, knew or should have known that the Heckleville fire might burn to the Pacific Ocean (R. 232, Amend. Findings of Fact IX., see also R. 197). The court commented that "There is no question about that." (R. 249).

Next, the Government erroneously quotes one fire boss' testimony as refutation of another's testimony. The witness quoted by the Government as establishing the fire jumped a completed fire line wet down on both sides in fact said that the fire jumped over his line at 2:30 while he was in the process of constructing a bulldozer line and while he was wetting the line down (Tr. 1076-77). The acts of this witness and others was the basis for the court's finding of Forest Service negligence in not having proceeded earlier and more vigorously in attacking the fire.

Mr. McDonald was the first person at the 1600-acre area after the fire escaped into the Fibreboard slash and before it made the jumps towards Forks. Appellants' brief clearly so states and accurately

sets forth his eyewitness observations of what occurred at that time and place.

In chivvying appellants for failing to note that an exhibit mentioned was not admitted into evidence, the Government fails to note that the quotation in appellants' brief was an exact quotation of a question asked and answered on oral examination, and rests not a whit upon the written exhibit itself.

Both the Government and PAW complain of a passing reference to Government negligence continuing up to the time the fire was controlled in the 1600-acre area. The court so characterized the meaning of his findings, saying in his opinion:

> "The Court has found the Forest Service negligent in its fire-fighting action during the initial period, August 6-10, in which interval the fire reached Fibreboard lands." (R. 189).